

DOUGLAS NOLAND

IBLA 94-590

Decided July 22, 1997

Appeal from a Stateline (Nevada) Resource Area Office, Bureau of Land Management, Decision that Douglas Noland's use of public lands was in trespass and that he must remove personal property and reclaim the affected areas. N-57607.

Affirmed.

1. Trespass: Generally

Under the regulation at 43 C.F.R. § 2801.3(a), occupancy or development of the public lands in a manner that requires a right-of-way, temporary use permit, or other authorization without first obtaining the required authorization constitutes a trespass.

2. Trespass: Generally--Trespass: Measure of Damages

It is proper for BLM to direct removal of improvements unintentionally erected in trespass on public land and require the trespasser to either rehabilitate lands harmed by the trespass or pay the rehabilitation costs incurred by the United States.

3. Administrative Authority: Generally--Rights-of-Way:
Federal Highway Act

In granting a right-of-way over public lands pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1994) (formerly 23 U.S.C. § 18 (1946)), the Secretary of the Interior retains administrative authority over lands subject to the right-of-way.

4. Act of August 27, 1958--Mining Claims: Lands Subject
To--Rights of-Way: Federal Highway
Act

The interest conveyed by the Department of the Interior to a state highway department pursuant to the Federal Aid Highway Act, Aug. 27, 1958, 23 U.S.C. § 317 (1994),

is a right-of-way and not a fee simple interest, such right-of-way interest is subject to the Secretary's jurisdiction, and the Secretary may issue other rights-of-way across the same land, so long as the other rights-of-way do not materially interfere with the intended use of the land pursuant to the previously issued Federal Highway Act right-of-way.

APPEARANCES: Daniel Markoff, Esq., Las Vegas, Nevada, for Douglas Noland.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Douglas Noland, doing business as A & N Mining, Inc., (Noland), has appealed a May 31, 1994, Trespass Decision issued by the Stateline (Nevada) Resource Area Office, Bureau of Land Management (BLM), declaring Noland in trespass under the provisions of the regulations at 43 C.F.R. Part 2800, as a result of his unauthorized use of the public lands, and directing him to remove all water and electrical lines, plug all wells in the trespass area, and reclaim all surface disturbances.

On December 21, 1962, BLM issued Material Site Right-of-Way Nev-059097 (ROW NEV-059097) to the Nevada Department of Transportation (NDOT), pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1994) and 43 C.F.R. § 244 (1962), subparts A and G. The land encompassed by ROW NEV-059097 includes 120 acres in the SW¼ SW¼, sec. 29; the SE¼ SE¼, sec. 30; and the NW¼ NW¼, sec. 32, T. 28 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada. ¹/

In 1984 Noland and a partner located 21 placer claims (the Gem Claim Group (NMC 297635 through NMC 297655)). In a February 20, 1986, Decision (1986 Decision), BLM declared the Gem #1 mining claim (NMC 297635) and the Gem #9 mining claim (NMC 297643) null and void ab initio because they had been located on land withdrawn from mineral entry by ROW NEV-059097. The 1986 Decision was affirmed by this Board in Russell Avery and Douglas E. Noland, 99 IBLA 22, 23 (1987).

On November 14, 1986, Noland relocated mining claims on the land previously covered by the Gem #1 and Gem #9 claims, naming the new claims as the Gem 1A (NMC 391250), Gem 1B (NMC 391251), Gem 9A (NMC 391266), and Gem 9B (NMC 391267). In a June 18, 1990, Decision (1990 Decision) BLM again declared the claims null and void ab initio. Noland did not appeal the 1990 Decision.

Noland has a mineral processing mill on the Gem #5 claim (NMC 297639). He also holds two groundwater well permits, which were granted to Gem

¹/ The ROW NEV-059097 was amended on June 12, 1989, to include an access road to the materials site designated CL-32-2.

Enterprises on June 27, 1985, by the State of Nevada Division of Water Resources, Department of Conservation and Natural Resources. The well under permit 51854 is located on that portion of the NDOT materials site that was subject to the Gem #9 claim in 1984. The well held under permit 49651 ^{2/} is on that portion of the NDOT materials site that was subject to the Gem #1 claim in 1984. Apparently believing he had properly located mining claims, Noland had drilled the wells, and installed electrical lines and water lines from the wells to the mill facility.

During the period that the 1986 Decision was on appeal, BLM was uncertain of its role in authorizing Noland's use of the public lands subject to ROW NEV-059097. On October 2, 1987, Noland and his partner filed a mining plan pursuant to 43 C.F.R. § 3809 (1987 Mining Plan). ^{3/} In the 1987 Mining Plan Noland identified the Gem #5 (NMC 297639) as a mill site to be supplied with "power line & transformer from power line, already approved by Pacific power * * *." The 1987 Mining Plan also contemplated installing "approximately 2300 ft. of three phase powerline from [the] main line to the processing mill site" and installing "pipe line [from a well located in the material site] to millsite." (1987 Mining Plan at 1, 2.) On September 4, 1990, Noland filed an operating plan (1990 Plan), giving notice of his intent to conduct exploration work ^{4/} on the Gem Claim Mill Site (Gem #5) and stating that "access to project is over existing roads. [E]xisting roads were constructed prior to Jan. 1st 1981." (Plan of Operations filed Sept. 4, 1990, at 1, 2.)

The 1990 Plan was reviewed by BLM and it requested additional information regarding the number of acres to be disturbed, a precise description, by township, range, and section, of the area where the mining activity would take place, and the date the activity would start. (Letter dated Sept. 7, 1990, to Douglas Noland from Stateline Resource Area Manager, BLM.) On November 5, 1990, in a hand-written amendment to his 1990 Plan, Noland filed the information requested by BLM and stated that he "hope[d] to begin operation before December 31 st 1990."

In November 1990, BLM staff conducted an evaluation of the resource values and assessed surface protection concerns regarding the land

^{2/} On June 23, 1986, the Nevada State Engineer granted Noland a permit to change the point of diversion of the water to be used under permit 47655. The permit for the new diversion site was designated 49651. Permit 49651 reads in pertinent part: "This Permit does not extend the permittee the right of ingress and egress on public, private, or corporate lands." (Application for Permission to Change Point of Diversion, Manner of Use and Place of Use of the Public Waters of the State of Nevada Heretofore Appropriated, Noland's Exhibit B.)

^{3/} The plan was identified by hand-written notation as N56-88-004N.

^{4/} This notice was assigned serial number N54-90-17N. See Letter dated Nov. 19, 1990, to Noland from BLM Stateline Resource Area Manager.

described in the 1990 Plan, as amended. In a letter dated November 19, 1990, BLM informed Noland that his plan "contain[ed] the required information as prescribed by regulation." 5/

On May 31, 1994, BLM issued the Trespass Decision declaring Noland in trespass under the provisions of the regulations at 43 C.F.R. Part 2800 for unauthorized use of the public lands and directing him to remove all water lines and electrical wiring, plug the wells, and reclaim all surface disturbances to match the contours of the surrounding area. Noland was also informed that "[y]our trespass liability to date is pending completion of an appraisal" and that failure "to remove improvements * * * [and] complete reclamation to the satisfaction of the BLM" could result in an assessment of "additional charges for the [reclamation] work, if performed by BLM." (Decision at 1, 2.) Noland appealed, and in a July 21, 1994, Order the Trespass Decision was stayed pending adjudication of this appeal. Neither NDOT nor BLM has entered an appearance.

In his Statement of Reasons on Appeal (SOR), Noland does not deny that he has placed water lines, wiring and other improvements across public lands subject to ROW NEV-059097. He argues that before entering the land he searched "all public records in Clark County" and, finding no competing claim or interest by NDOT, located his mining claims. Noland asserts that he obtained valid water well permits from the State of Nevada for the two wells on the lands subject to ROW NEV-059097, and drilled the wells at his own expense. (SOR at 3.)

Noland argues that NDOT has not used material from the material site since 1986, but has not given notice as required by 23 U.S.C. § 317(c) (1994). 6/ Noland also argues that, pursuant to 43 U.S.C. § 1766 (1994), NDOT's failure to use the material site right-of-way for 8 years or assert its need to use the right-of-way constitutes a rebuttable presumption of abandonment. (SOR at 4.)

Noland submits what he identifies as a photocopy of a receipt dated May 6, 1994, for a New Claim 94 Maintenance Fee/Location Fee payment for a mining claim identified as NMC 599386 and asserts that the receipt validates his claim to the land subject to ROW NEV-059097. (SOR at 5, Exhibit D.) 7/ Finally, Noland argues that NDOT has demonstrated no use for

5/ Letter dated Nov. 19, 1990, from BLM Stateline Resource Area Manager to Douglas E. Noland at 1.

6/ The SOR cites 23 U.S.C. § 318 (1994), but it is apparent that Noland intended to cite 23 U.S.C. § 317(c) (1994).

7/ Noland appears to misunderstand the purpose of the maintenance fee/location receipt offered as exhibit D. The face of the receipt bears the following statement:

"NOTE: This notice is a receipt for monies paid the United States. If these monies are for required fees in connection with your application to lease, purchase, enter, or otherwise acquire an interest in public lands or

the mineral materials at the materials site and, at the same time, has failed to cooperate by approving the transport of water from his wells to his mill site. (SOR at 7.)

[1] There is no dispute that ROW NEV-059097 and Noland's water lines, wiring, and wells are situated on Federal lands. It is also clear that no right-of-way or temporary use permit was issued to Noland for his water lines and electrical transmission lines traversing Federal lands from his well sites to his mill site. Under 43 C.F.R. § 2801.3(a), occupancy or development of the public lands in a manner that requires a right-of-way, temporary use permit, or other authorization without first obtaining the required authorization is an act of trespass. The regulation at 43 C.F.R. § 2800.0-5(u) defines trespass as "any use, occupancy or development of the public lands or their resources without authorization * * *, or which exceeds such authorization or which causes unnecessary or undue degradation of the land or resources." As noted in Russell Avery and Douglas E. Noland, *supra*, "material site rights-of-way created under the Federal Aid Highway Act, August 27, 1950, 23 U.S.C. § 317 (1982), effectively withdraw the lands affected from entry and location under the mining law." Noland's mining claims were null and void ab initio because they had been located on lands previously withdrawn from mineral entry by ROW NEV-059097. Thus, when Noland drilled his wells and installed his equipment without having obtained a right-of-way, he was in trespass. See Double J Land and Cattle Co., 126 IBLA 101 (1993). Thus, BLM correctly found Noland in trespass. 8/

We find no merit in Noland's argument that he was not in trespass because he had searched "all public land records in Clark County [Nevada]" before locating his mining claims. We note that the BLM master title plat and serial register pages for T. 28 S., R. 63 E. indicate that the lands at issue in secs. 29, 30, and 32 were subject to ROW NEV-059097. Noland was thus placed on notice that these lands were not open to mineral entry.

Noland also argues that he is authorized to locate his mining claims on lands subject to ROW NEV-059097 "because the last use by NDOT of the material from the site was in 1986," and has not given notice of its nonuse pursuant to 23 U.S.C. § 317(c) (1994), thus invoking a rebuttable presumption of abandonment under 43 U.S.C. § 1766 (1994). 9/ (SOR at 4.)

fn. 7 (continued)

resources, this receipt is not an authorization to utilize the land applied for and it does not convey any right, title, or interest in the land for which application is made."

8/ Under the circumstances of this case, which are outlined below, we do not deem the trespass to be willful. See Curtis Sand and Gravel, 95 IBLA 104, 94 Interior Dec. 1 (1987).

9/ 43 U.S.C. § 1766 (1994) reads in pertinent part:

"Prior to commencing any proceeding to suspend or terminate a right-of-way the Secretary concerned shall give written notice to the holder of the grounds for such action and shall give the holder a reasonable

Section 317(c) of 23 U.S.C. provides as follows:

If at any time the need for any such lands or materials for such [material site] purposes shall no longer exist, notice of this fact shall be given by the State highway department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

Pub. L. No. 85-767, Aug. 27, 1958, 72 Stat. 916. 10/

Nothing in the record indicates the NDOT no longer has a use for ROW NEV-059097, or that it has communicated to BLM its intent to relinquish the materials site. The record contains a report of a field examination of the material site conducted by BLM on February 19, 1988, which asserts that "the site is presently used, on a regular basis." (Memorandum dated Mar. 15, 1988, from BLM District Manager to BLM State Director: Request for Amendment and Proof-of-Use: NDOT Material Site Right-of-Way (R/W) NEV-059097.) In a March 24, 1994, letter to Russell Avery and Douglas Nolan[d], the Director, NDOT, referred to ROW NEV-059097 as "a very important materials resource which is needed to meet present and future highway needs in Clark County * * *." The NDOT Director concludes by stating: "By copy of this letter to BLM, I am providing BLM with the notice of NDOT's position that it wishes to preserve the integrity of this material site for public highway use." There is no support for Noland's assertion that ROW NEV-059097 has been relinquished or abandoned.

[2] It is proper for BLM to direct removal of improvements unintentionally erected in trespass on public land. Clive Kincaid, 111 IBLA 224 (1989). A trespasser must either "rehabilitate" lands harmed by the trespass or pay the costs incurred by the United States in doing so. 43 C.F.R. § 2801.3(b)(3).

fn. 9 (continued)

time to resume use of the right-of-way * * *. Failure of the holder of the right-of-way to use the right-of-way for the purpose for which it was granted, issued, or renewed, for any continuous five-year period, shall constitute a rebuttable presumption of abandonment of the right-of-way * * *."

The record shows that the presumption of abandonment does not apply to this case.

10/ The regulation implementing this provision as it was applied to the material site right-of-way granted to the NDOT on Dec. 21, 1962, is found at 43 C.F.R. § 244.54(b)(3). Circ. 2084, 27 Fed. Reg. 6934 (July 21, 1962). The regulation authorized notification from the State highway department directly to the bureau which granted the right. See Code of Federal Regulations, Title 43--Public Lands: Interior (Revised as of Jan. 1, 1963), Part 244 n.27.

[3, 4] The record contains a handwritten note by a BLM employee dated June 25 (no year indicated), which reads:

Ed_____

We need to trespass Noland and Avery for their 2 wells and pipeline of the NDOT mat. site R/W. NDOT wants them removed; neither they nor we gave permission. Check with [BLM employee] if any ?'s

Gary

A second handwritten note reads as follows:

5-26-93 D. Noland came in to meet with Pat Hall and me. He was told to submit an amended notice [of mining operations] to show all wells, powerlines, and pipelines on NDOT MAT site row. We will file a trespass and go to NDOT to resolve. He may get a row from NDOT.

In a September 14, 1993, letter (Trespass Notice), BLM notified Noland that it had instituted trespass proceedings against Noland for unauthorized use of the public lands, pursuant to 43 C.F.R. § 2920.1-2 and 43 C.F.R. § 3809. In the Trespass Notice, BLM stated:

You have a well and water line on a Nevada Department of Transportation (NDOT) material site right-of-way which are in trespass. You also propose additional improvements that may only be completed if NDOT either relinquishes the right-of-way or agrees to allow BLM to grant you a right-of-way for your improvements. In addition, there are ponds on the material site adjacent to your property that you have used that must be reclaimed before we can authorize any of your proposals. The activities have taken place in an area encompassed by T. 28 S., R. 63 E., Mount Diablo Meridian, Nevada.

* * * * *

We have information that you provided us concerning the well and your proposed mining Notice (BLM file N54-90-071N) that we will convey to the NDOT.

(Trespass Notice at 1.)

In a letter to NDOT, dated December 2, 1993, the Stateline Resource Area Manager noted:

Noland [and his partner] may have a valid water right at the wells on the NDOT material site right-of-way, but they have no

right to use the material site right-of-way. NDOT has a valid existing right which predates Anderson and Noland Mining Inc.

We need a written response from you concerning NDOT's position on * * * Noland's trespass. Will you either relinquish your right-of-way or grant BLM authorization to issue a right-of-way to * * * Noland for part or all of * * * [his] proposed activities on the site?

(Letter from Stateline Resource Area Manager to Jon Bunch, NDOT at 1. See also Letter dated Dec. 2, 1993, from Stateline Resource Area Manager to Daniel Markoff, Esq., Counsel for Noland, at 1.)

In a letter to the Director of NDOT, dated March 4, 1994, Robert N. Anderson, President of A & N Mining, Inc., asked NDOT to consider entering into an encroachment agreement to allow Noland and A & N Mining, Inc., to install electrical and water lines accessing the water wells on the material site right-of-way. Anderson asserted that "[a]s an engineer, City Planner, and Senior Partner of a planning and architectural firm, I have worked with many State Departments of Transportation, coordinating private projects with state highways and right-of-way. I have been party to hundreds of two and three party encroachment agreements." 11/ (Letter to Mr. Garth Dull, Director of NDOT, at 1.)

Anderson also stated:

I understand that your Las Vegas office has recommended that we be allowed to maintain the existing lines and install the new lines, as shown on the enclosed map, with the understanding that if DOT needed the portions of the site where our lines were located, that we would agree to relocate them at our expense. [12/] It was considered somewhat unlikely that

11/ In his letter to Director Dull, Anderson identifies himself as the president of A & N Mining, Inc. Anderson also states: "My associate, Mr. Douglas Noland is Vice President of our company, which has a lease purchase agreement with GEM Enterprises, a partnership between Mr. Noland and Mr. Russell Avery." (Letter of Mar. 4, 1994, at 1.)

12/ In a memorandum dated Feb. 9, 1994, to Garth Dull, Director, NDOT, the Senior Deputy Attorney General, State of Nevada, stated:

"The department may permit [Noland and A & N Mining, Inc.] to operate in the pit if this does not interfere with NDOT's use, and if the BLM approves. I recommend [Noland and A & N Mining, Inc.'s] permit include an indemnity clause, liability insurance naming the department as an additional insured, and that [Noland and A & N Mining, Inc.] agree to provide water on future NDOT projects in the area, or front the cost of a well which would supply that water to compensate for NDOT's well [Noland and A & N Mining, Inc. are] using. [Noland and A & N Mining, Inc.'s] use of NDOT's pit must not be to the public detriment. The Director of NDOT has the discretion to grant or deny such a permit."

NDOT would need these areas since they would traverse portions of the materials site where either materials have already been removed or in an area parallel to the Bureau of Land Management's designated vehicular access route, which connects within the north-south public road and serves all land west of the NDOT materials site.

(Letter to Mr. Garth Dull, Director of NDOT, at 2.)

By letter dated March 24, 1994, Director Dull responded to Anderson's proposal as follows:

It is my position that NDOT cannot agree to issuance by B.L.M. of separate right-of-way grants for the well site, pipeline, and powerline because of the serious conflicts and increased costs such rights would pose for the Department and its contractors. This is a very important materials resource which is needed to meet present and future highway needs in Clark County and I will not compromise the public interest in this site by either relinquishing it or rendering it awkward and expensive to use.

By copy of this letter to BLM, I am providing BLM with the notice of NDOT's position that it wishes to preserve the integrity of this material site for public highway use.

(Letter from Garth Dull, Director, NDOT, to Russell Avery and Douglas Noland at 1.)

In Kenneth L. Ingram, 96 IBLA 290 (1987), this Board affirmed a BLM rejection of an application for conveyance of a Federally-owned mineral interest because the land applied for was subject to a material site right-of-way issued pursuant to section 17 of the Federal Aid Highway Act of November 9, 1921, 23 U.S.C. § 18 (1946). We held that "BLM correctly rejected the application because the mineral interests applied for were already conveyed and not available for conveyance under section 209(b)(1) of [the Federal Land Policy and Management Act of 1976]." We also stated that while a material site right-of-way grant created under 23 U.S.C. § 18 (1946), now 23 U.S.C. § 317 (1994), effectively renders the land unavailable for mineral entry, the record title to the mineral material is not in the state holding the materials site right-of-way but in the United States:

A material site right-of-way does not transfer title to the lands. Title to and jurisdiction over the lands remains with the Secretary, who retains the authority to review the present and past circumstances of the grant. Southern Idaho Conference Association of Seventh Day Adventists v. United States, 418 F.2d 411 (9th Cir. 1969); State of Alaska, 46 IBLA 12, 17-18 (1980).

Ingram, supra, at 292.

While acknowledging that "no cancellation authority is expressly created by 23 U.S.C. § 317," we also observed that the Secretary, by nature of his authority to promulgate regulations implementing the Act, possesses "an inferred authority to cancel a material site right-of-way." Id.; see also State of Alaska, Department of Highways, 20 IBLA 261, 268, 83 Interior Dec. 242, 244 (1975). The Secretary's discretionary authority is manifest in the regulation at 43 C.F.R. § 2803.4, which provides in pertinent part:

(b) The authorized officer may suspend or terminate a right-of-way grant or temporary use permit if he determines that the holder has failed to comply with applicable laws or regulations, or any terms, conditions or stipulations of the right-of-way grant or temporary use permit or has abandoned the right-of-way.

Because title to the land is not transferred to the state when a material site right-of-way is granted pursuant to 23 U.S.C. § 317 (1994), the Secretary has the authority to determine whether additional right-of-way or temporary use permits should be granted over the Federal lands subject to the material site right-of-way. Clearly, mineral entries are not permitted. Issuance of temporary use permits and rights-of-way across the Federal public lands is within the discretionary authority of the Secretary, pursuant to the regulations at 43 C.F.R. Subpart 2800. See 43 C.F.R. § 2800.0-2.

By this Decision we affirm the propriety of BLM's finding of Noland's trespass on the Federal public lands and its order to remove the trespass structures. However, BLM has authority to extend the time allowed for removal of facilities and rehabilitation of the land to allow Noland an opportunity to file an application for a right-of-way, and we perceive no barrier to its doing so. ^{13/} Noland and BLM are advised, however, that under 43 C.F.R. § 2801.3(e) and § 9239.7-1, BLM is required to refrain from granting authorization to use the lands until the trespass damages are fully satisfied, or the trespasser files a bond.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

R.W. Mullen
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

^{13/} Any right-of-way BLM deems appropriate would necessarily be subject to the prior rights of the State, and should provide that Noland's use should not unreasonably interfere with the State's.